IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO "MOTION OF TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., SIMMONS FOODS, INC., WILLOW BROOK FOODS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., GEORGE'S, INC., GEORGE'S FARMS, INC., AND PETERSON FARMS, INC. FOR JUDGMENT AS A MATTER OF LAW IN LIGHT OF PLAINTIFF'S CONSTITUTIONAL VIOLATIONS"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes & Rules

Treatises

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (the "State"), and responds to "Motion of Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., Willow Brook Foods, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., and Peterson Farms, Inc. for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations" [DKT #1064] ("Defendants' Motion")[1] as follows:

The Attorney General has been charged with broad responsibilities and granted broad powers to protect the interests of the State, including the State's interest in a clean, healthy, safe environment. The Poultry Integrator Defendants by their conduct have impaired this interest. Given the enormity of the environmental pollution problem created by the Poultry Integrator Defendants in the Illinois River Watershed ("IRW"), however, the Office of the Attorney General did not have the personnel or financial resources to prosecute a lawsuit to bring these polluters to justice. Accordingly, consistent with his duties and authority, the Attorney General retained outside counsel on a contingency fee basis to ensure that the interests of the State would be protected. Certain of the Poultry Integrator Defendants[2] (hereinafter "Defendants") now

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[1] Curiously, while the motion purports to be on behalf of all of these parties, only counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. appear on the signature page, and there is nothing on the signature page to indicate these counsel have authority to submit this motion on behalf of the other Defendants. *See, e.g.,* 27 Federal Procedure, Lawyers Edition, § 62:116 ("A pleading which purports to be filed on behalf of more than one party to a matter must be signed by each party or, if the party is represented, by the party's attorney").

[2] Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., Willow Brook Foods, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., and Peterson Farms, Inc.

challenge this contingency fee contract (the "Contract"). Defendants' effort to have the case dismissed or to disqualify outside counsel on the basis of the contingency fee contract is nothing but a transparent (and meritless) effort to escape being held accountable for their pollution of the IRW. Defendants' Motion should be denied in its entirety for the following reasons:

1. Resolution of the *New Mexico* Motion will not dispose of Defendants' Motion.

2. The Contract, which provides for a contingency fee, does not violate federal or state due process.

3. The Contract does not violate the separation of powers provisions of the Oklahoma Constitution.

4. Defendants have waived their right to object to the retention of outside counsel on a contingency fee basis by having waited nearly 2½ years to raise their claims of alleged (but unfounded) constitutional infirmities.

5. This action was brought by the Attorney General, who is authorized by law to do so, and therefore there can be no legal basis for dismissal.

I. Background

The Attorney General is the chief law officer for the State and is charged with protecting the State's interests. *See* 74 Okla. Stat. §§ 18, 18b. Because of the poultry industry's unwillingness to step up to its legal responsibility to safely manage the massive amounts of poultry waste being generated at its poultry growing operations and poultry growing operations under contract with it in the Illinois River Watershed ("IRW") and elsewhere, the Attorney General was forced to turn to litigation to protect the State's interests. Environmental litigation, however, "is tremendously complex, lengthy, and expensive," *see, e.g., Boeing Company v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000), and the poultry industry is well-resourced.[3]

[3] For example, Tyson Foods, Inc. was ranked number 80 on the 2006 Fortune 500 list of America's biggest corporations, and Cargill, Inc. was ranked number 1 on the 2005 Forbes list of America's largest private companies. *See* http://money.cnn.com/magazines/fortune /fortune500/full_list/ & http://www.forbes.com/2005/11/09/largest-private-companies_

However, the Office of the Oklahoma Attorney General has limited resources, both in number of available personnel and amount of available finances. *See* Ex. 1 (Gruber Affidavit, ¶ 5). In order to fulfill his statutory charge of protecting the State's legal interests, therefore, the Attorney General recognized he would need the services of additional private attorneys working under his direction to assist in prosecuting the State's civil claims against the poultry industry and to protect the IRW. *See generally* Ex. 1 (Gruber Affidavit, ¶¶ 3, 4, 5 & 6).

It being well-established that the Oklahoma Attorney General has the power to retain private attorneys to assist the office in its prosecution of civil claims, *see, e.g.,* 74 Okla. Stat. § 20i(A)(2),[4] the Office of the Attorney General issued a request for proposal ("RFP"). *See* Ex. 3 (RFP #2002-EPU-01). The RFP made it clear from the outset that the Attorney General would retain complete control over the litigation against the poultry industry. *See* Ex. 3, § 3.1.1 ("All aspects of the legal representation will be overseen and approved by the Attorney General"); *see also* Ex. 3, §§ 1.4.1, 1.4.2 & 1.4.3. In response to the RFP, the State received several proposals. The proposals were evaluated based upon the following factors: "experience, qualifications, adequacy of staffing, reasonableness of fee agreement, and financial condition." *See* Ex. 3, § 5.1.

At the conclusion of the RFP process, the Attorney General selected the firms of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., Miller & Keffer, LLP, and Motley Rice LLC. *See* Ex. 1 (Gruber Affidavit, ¶ 7). A contract was negotiated and executed. *See* Ex. 4. By the

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[4] Counsel for the Tyson Defendants appears to agree. *See* Ex. 2 ("AG's contingency lawyers illegal, poultry firms say," *Tulsa World*, March 2, 2007 ("[Tyson Attorney Robert] George agreed that the attorney general has the authority to hire outside legal counsel")).

express terms of the Contract, the Attorney General has complete control over all aspects of the litigation. For example, paragraph 1 of the Contract provides:

> The lawyers are willing to prosecute such an action . . . under the direction and control of the Oklahoma Attorney General. The Attorney General shall determine the appropriate defendants and theories of liability, and shall have overall control and direction of the litigation, including but not limited to approval of staffing to be employed by the lawyers and approval of experts to be used in the suit as consultants or witnesses.

See Ex. 4, ¶ 1. Paragraph 2 of the Contract underscores this point, providing: "The lawyers shall consult with and obtain the prior written approval of the Attorney General or his designee concerning major issues affecting the suit, including but not limited to the petition and dispositive motions, selection of consultants, experts and other professional services, discovery, pre-trial proceedings, trial, and settlement negotiations." *See* Ex. 4, ¶ 2. And paragraph 5 of the Contract provides: "The parties recognize that the suit will be one in the public interest, and that public statements about its conduct shall come from the Attorney General or his designee." *See* Ex. 4, ¶ 5. Consistent with the terms of the Contract, the Attorney General has at all times retained complete control over all aspects of the litigation. *See* Ex. 1 (Gruber Affidavit, ¶ 9). At no time has the Attorney General delegated supervisory or decision-making responsibilities to outside counsel. *See* Ex. 1 (Gruber Affidavit, ¶ 10).

Outside counsel have been retained on a contingency fee basis.[5] *See* Ex. 4, ¶¶ 1, 2 & 3. Pursuant to the terms of the Contract, outside counsel are required to advance the costs and expenses of the litigation. *See* Ex. 4, ¶ 2. In the event the State is successful in the litigation, outside counsel will be entitled to recovery of the advanced costs and expenses, as well as a contingency fee of 33⅓% of any monetary damages recovered and 33⅓% of the value of any injunctive relief obtained. *See* Ex. 4, ¶¶ 3(c) & (d). In no event, however, may the total amount of costs, expenses and attorney fees exceed 50% of the amount of the monetary damages unless the Court orders the Poultry Integrator Defendants to pay outside counsel's costs, expenses and attorney fees and those Court-ordered costs, expenses and attorney fees exceed 50% of the amount of the monetary damages. *See* Ex. 4, ¶¶ 3 (e), (f), (g) & (i).

It has been no secret that the Attorney General retained outside counsel on a contingency fee basis to work at his direction on the case. A September 11, 2004 article entitled "Oklahoma hires firm, threatens poultry-litter suit" in the *Arkansas Democrat-Gazette* reported on the hiring:

> Edmondson said Friday that he hired independent counsel in July to represent the state in a possible lawsuit against the companies. The lawyers work for firms in Tulsa and South Carolina and have expertise in environmental litigation, he said.

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[5] The State routinely retains outside counsel on a contingent fee arrangement. For example, the State has retained outside counsel on a contingency fee basis (1) to prosecute asbestos property damage claims, *see* Ex. 5, (2) to collect unpaid or underpaid mineral severance taxes, *see* Ex. 6, (3) to collect provider over-payments that cannot be collected by the Oklahoma Health Care Authority, *see* Ex. 7, and (4) to act as bond counsel in connection with the issuance of bonds. *See* Exs. 8 & 9. In fact, Kutak Rock LLP, counsel for the Tyson Defendants, has been the beneficiary of a number of contingency fee contracts with the State. *See, e.g.*, Exs. 8 (December 20, 2005 Bond Counsel Engagement Letter Agreement between Oklahoma Student Loan Authority and Kutak Rock LLP, providing that "[t]he Authority and bond counsel have agreed that bond counsel's compensation for services rendered to the Authority in connection with the engagement will be payable only in connection with, and contingent upon, the actual issuance of debt by the Authority") (emphasis added); 9 (same). Moreover, Kutak Rock continues to seek representation of the State on a contingency fee basis. *See* Ex. 10 (January 29, 2007 response to Oklahoma Water Resources Board RFP by Kutak Rock proposing that "[b]ond counsel fee and expenses will be contingent upon the successful completion and delivery of the proposed bond issue . . .") (emphasis added).

> The five [poultry] companies will be asked to pay the state's legal costs that have occurred so far and in the future, he said.

Ex. 11. Further, counsel for Defendant Simmons, one of the movants, has had possession of a copy of the Contract for Legal Services since as early as September 20, 2004, as reflected by the fax legend on Exhibit A to Defendants' Motion. Moreover, over the next several years, the fact of the contingency fee retention has been discussed in the press on multiple occasions. *See, e.g.*, Ex. 12 ("Poultry lawsuit expense mounts," *Tulsa World*, Aug. 24, 2005); Ex. 13 ("Private law firms may get half of damages in poultry case," *Daily Ardmoreite*, Sept. 19, 2005); Ex. 14 ("Top firm takes on poultry industry," *Arkansas Democrat Gazette*, Feb. 5, 2006).

On June 13, 2005, the State filed suit against the Poultry Integrator Defendants. [DKT. #2] The Complaint was signed by the Attorney General. [DKT #2] Now, on February 28, 2007, nearly 2½ years after apparently learning of the Attorney General's retention of outside counsel on a contingency fee basis to assist in prosecuting the civil lawsuit against the poultry industry for pollution of the lands, rivers, streams and waters of the State of Oklahoma and more than 1½ years into the case -- that is, when it has become ever more clear that they are indeed going to be held accountable for their pollution of the IRW -- Defendants filed the instant Motion.

II. Legal Standard

Defendants have brought this motion pursuant to Fed. R. Civ. P. 12(c). Defendants' Motion, p. 1. Whether this is properly a motion for judgment on the pleadings is questionable. In any event, however, motions brought pursuant to Fed. R. Civ. P. 12(c) seeking the dismissal of claims are viewed with disfavor. "Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice." *Van Deelen v. City of Eudora*, 53 F. Supp. 2d 1223, 1227 (D. Kan. 1999) (citing *Cayman Exploration Corp. v. United Gas Pipe Line*, 873 F.2d 1357, 1359 (10th Cir. 1989)). Motions for judgment on the

pleadings are treated as motions to dismiss under Fed. R. Civ. P. 12(b)(6), *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528 (10th Cir. 1992), which are viewed with disfavor and are therefore rarely granted. 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990). The standard by which the Tenth Circuit will uphold a grant of judgment on the pleadings is a strict one. Specifically, the Tenth Circuit will uphold such a grant "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1241 (10th Cir. 2005) (internal quotation marks omitted) (reversing district court's grant of judgment on the pleadings based on undeveloped record).

To the extent Defendants seek disqualification of outside counsel rather than dismissal, the legal standard is equally high. "Motions to disqualify counsel are viewed with disfavor, and disqualification is considered a drastic measure that courts should hesitate to impose except when absolutely necessary." *In re Shore*, 2004 WL 2357995, *1 (Bankr. D. Kan. May 14, 2004); *see also Compass Marketing, Inc. v. Schering-Plough Corp.*, 2006 WL 1892405, *2 (D. Md. July 6, 2006) ("Because disqualification of counsel can deprive a party of his choice of attorneys, courts should only take such a step in rare circumstances"). "The party seeking disqualification of an opposing party's counsel must carry a heavy burden, and must meet a high standard of proof." *In re Shore*, 2004 WL 2357995, *1; *see also Ello v. Singh*, 2006 WL 2270871, *2 (S.D.N.Y. Aug. 7, 2006) ("Because motions to disqualify counsel can often be tactically motivated, cause delay and additional expense, and disrupt attorney-client relationships, the movant must meet a high standard of proof to disqualify the non-movant's counsel") (citing cases); *Richardson-Merrell, Inc. v. Koller,* 105 S.Ct. 2757, 2763 (1985) ("[W]e share the Court of Appeals concern about 'tactical use of disqualification motions' to harass opposing counsel").

III. Argument[6]

A. Resolution of the *New Mexico* Motion will not dispose of Defendants' Motion

Defendants assert that resolution of their *New Mexico* Motion [DKT #1004] would be dispositive of Defendants' Motion. Defendants are wrong. Even assuming *arguendo* that Defendants were correct that *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), precludes compensating outside counsel out of the State's CERCLA natural resource damages recovery (which the State does not concede), outside counsel still have a variety of means of being compensated under the Contract.[7]

As an initial matter, to the extent it is even applicable, *New Mexico* is limited only to natural resource damages claims asserted under CERCLA. The viability of certain of the State's CERCLA natural resource damages claims has not been conceded by Defendants. Defendants have, *inter alia*, challenged whether the IRW qualifies as a "facility" under CERCLA, whether poultry waste or the constituents of poultry waste are "hazardous substances" under CERCLA,

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[6] Defendants' effort to again (*see, e.g.,* Plaintiff State of Oklahoma's Response in Opposition to "Tyson Defendants' Motion to Compel," pp. 2-4 [DKT #1036]) personalize their arguments and to make unfounded, inflammatory allegations about counsel in this lawsuit should not be tolerated by this Court. *See, e.g.,* Defendants' Motion, p. 18 (alleging that "the Attorney General deliberately and knowingly entered into the Contingency Fee Contract in direct contravention of the Oklahoma Constitution in order to line the pockets of his favorite private attorneys and campaign contributors"). Whether a contingency fee contract with outside counsel violates due process or the separation-of-powers doctrine (which it clearly does not) plainly does not turn on which particular outside counsel is retained. Moreover, in any event, the criteria for retaining the outside counsel in this case was based upon their "experience, qualifications, adequacy of staffing, reasonableness of fee agreement, and financial condition." *See* Ex. 3, § 5.1. The State submits Defendants should be strongly cautioned by the Court to adhere to the dictates of LCvR 83.8(e) which provides that "[l]awyers should treat each other, the opposing party, the Court, and members of the Court staff with courtesy and civility and conduct themselves in a professional manner at all times." Attempts by Defendants to impugn counsel's integrity with scurrilous accusations are flatly improper.

[7] For a more detailed discussion of the *New Mexico* decision and the flaws in Defendants' *New Mexico* Motion, please see "State of Oklahoma's Response to Defendants' Motion for Judgment on the Pleadings in Light of *New Mexico v. General Electric* [DKT #1021].

and whether the agricultural exemption to CERCLA applies to Defendants' poultry waste. Unless and until Defendants concede these points (or the Court overrules Defendants' challenges to the applicability of CERCLA to the certain of the State's natural resource damages claims, which it should do) and the State establishes its CERCLA natural resource damages claim, the pre-emptive reach of *New Mexico* will remain unresolved. Moreover, in the event Defendants succeed in defeating the State's CERCLA claims (which under the applicable law and facts the State strongly submits they should not), the State will still have available its non-CERCLA claims (*e.g.,* its common law claims) as vehicles for recovery of all of its natural resource damages. Nothing in *New Mexico* precludes outside counsel from being paid out of non-CERCLA natural resource damages recoveries.

Additionally, assuming that the State prevails on its allegations with respect to its CERCLA natural resource damages claims (as it should), and assuming *arguendo* that Defendants are correct in their argument that under *New Mexico* CERCLA provides the exclusive vehicle for recovery of natural resource damages caused by releases of hazardous substances (which the State does not concede), the State would still have all of its so-called "residual" claims for natural resource damages for which it could use, *inter alia,* its common law claims as the vehicle for recovery. *New Mexico* in no way precludes such claims or recoveries. *See New Mexico,* 467 F.3d at 1247 ("This is not to say the State's public nuisance and negligence theories of recovery are completely preempted in view of the ongoing remediation in the South Valley. We need not go that far"); *B.H. v. Gold Fields Mining Corporation*, 2007 WL 439025, *8 (N.D. Okla. Feb. 1, 2007) (same); *see also New Mexico*, 467 F.3d at 1250 ("Our view is entirely consistent with the State's most recent characterization of its NRD claim in its reply brief as 'residual to a CERCLA remedy.' . . . Because under the common law the State is not subject

to a statute of limitations, it may renew its common law claims for residual damages under state law if and when necessary").[8] Accordingly, outside counsel may be paid out of any non-CERCLA natural resource damages recoveries the State obtains.

Simply put, resolution of Defendants' *New Mexico* Motion is not dispositive of the question raised in Defendants' Motion. There are a variety of scenarios under which the State can recover damages that can be used to pay outside counsel consistent with the Contract and still achieve the goals of the lawsuit.

B. The Attorney General has authority to retain outside counsel on a contingency fee basis

The Attorney General is a constitutional executive officer, charged with performing duties prescribed by law. Okla. Const., Art. VI, § 1(A). The Attorney General is the chief law officer of the State. 74 Okla. Stat. § 18. His duties include initiating, appearing in and controlling the prosecution of actions in which the interests of the State or the people of the State are at issue. *See* 74 Okla. Stat. § 18b(3); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818 (Okla. 1973) ("In the absence of explicit legislative or constitutional expression to the contrary, [the Attorney General] possesses complete dominion over every litigation in which he properly appears in the interest of the State, whether or not there is a relator or some other nominal party"). Unless restricted or modified by statute, "the Attorney General's powers are as broad as the common law." *State ex rel. Derryberry,* 516 P.2d at 818-19.

As an officer of the executive branch, the Attorney General may obtain legal representation for the State by contracting with private attorneys when his office lacks the

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[8] Under Oklahoma law, the statute of limitations does not run against the State when it is acting, as is the case here, in its sovereign capacity to enforce a public right. *See State v. Tidmore,* 674 P.2d 14, 15 (Okla. 1983); *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988).

personnel or expertise to provide the specific representation required. *See* 74 Okla. Stat. § 20i(A)(3). This provision authorizes the hiring of outside counsel in the present case. Agreements entered into pursuant to this authority must contain the basis for or method of calculation of the fee including, "when applicable," the hourly rate for each attorney. 74 Okla. Stat. § 20i(C)(4)(a) (contract must set out "the basis for or method of calculation of the fee including, when applicable, the hourly rate for each attorney . . . who will perform services under the contract"). By requiring the contract to include "when applicable the hourly rate for each attorney," the Legislature clearly contemplated that under certain circumstances an hourly rate would not be "applicable" as the basis or method of calculating the fee. Courts interpreting statutory language must "give effect, if possible, to every clause and word." *See Hain v. Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006) (citation omitted). Giving full effect to the phrase "where applicable," it is plain that the Legislature contemplated the hiring of outside counsel on a contingency fee basis.

As noted above, the Attorney General also has common law powers. These common law powers underscore that the Attorney General has the authority to retain outside counsel on a contingency fee basis. *Cf. State ex rel. Nixon v. American Tobacco Company*, 34 S.W.3d 122, 136 (Mo. 2001) (en banc) ("The statute that allows for the [Missouri] attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorney fees directly to the State's outside counsel. In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general").

Thus, the State has, in fact, entered into contingency fee arrangements with outside counsel under a variety of circumstances, including contingency fee arrangements with the law firm representing the Tyson Defendants. *See, supra*, fn 5 (Exs. 5-9).

Finally, it bears remembering that the Legislature has established the general lawfulness of contingency fee contracts by providing that contingency fees of up to 50% are lawful. 5 Okla. Stat. § 7; *see also Martin v. Buckman*, 883 P.2d 185, 192 (Okla. Civ. App. 1994). Defendants suggest no reason to assume this unambiguous legislative authorization of contingency fee contracts should not apply to contracts in which the client is the State, and indeed, no such reason exists.

Simply put, there can be no question that the Attorney General has the authority to retain outside counsel on a contingency fee basis.

C. The Contract does not violate due process under federal or state constitutional law

Defendants first claim that the Contract violates the due process requirements of the Fourteenth Amendment, § 1, of the United States Constitution and Article II, § 7, of the Oklahoma Constitution. (Defendants' Motion, pp. 6–15.) This claim is fatally flawed for the reasons set forth below.

1. Defendants fail to state that any of their due process rights have been violated

As an initial matter, Defendants' Motion is devoid of any discussion as to how their due process rights are infringed by the State's retention of outside counsel on a contingency basis. Moreover, Defendants fail to explain whether the due process right they claim has been infringed is procedural or substantive. While Defendants provide a recitation of various constitutional and ethical principles (not all of which are properly analyzed or cited, as explained below), a line-by-

line review of Defendants' Motion reveals that they have failed to identify how the Contract violates any of their due process rights. The State, as well as this Court, should not be left to guesswork, and Defendants' claim on due process grounds should be rejected on this basis.

2. Because they failed to address, or even cite, relevant Tenth Circuit authority, Defendants' Motion should be denied; in any event, relevant authority instructs that the State's contingency fee arrangement does not violate due process

Defendants' Motion further fails to mention relevant Tenth Circuit authority, namely, *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001), in which the Tenth Circuit addressed, as a federal constitutional matter, the State's ability to utilize outside counsel in cases brought on behalf of the State. Notably, *Erikson* involved the participation of outside counsel in a criminal proceeding, the due process considerations of which are arguably greater than in a civil setting. *Erikson*, 263 F.3d 1151. In *Erikson*, the plaintiff -- who had previously been charged with, but never convicted of, murder for the fatal shooting of two men -- filed suit asserting various civil rights and tort claims, alleging, among other things, that his federal due process rights were violated because the private defendants, who included outside counsel, actively participated in and influenced the state prosecution. *Erikson*, 263 F.3d at 1153. The district court dismissed the plaintiff's claims. *Erikson*, 263 F.3d at 1154. On appeal, the Tenth Circuit affirmed the district court's dismissal and, among other things, expressly held that the plaintiff "failed to allege a federal constitutional violation." *Erikson*, 263 F.3d at 1153-54. The Tenth Circuit reasoned as follows:

> [T]he participation of a privately-retained attorney in a state criminal prosecution does not violate the defendant's right to due process under federal law unless the private attorney effectively controlled critical prosecutorial decisions. . . . Such decisions include 'whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant.' . . . Plaintiff has not alleged that [private counsel] exercised control over any critical prosecutorial decisions. . . . This is insufficient to state a claim for federal due process violation.

Erikson, 263 F.3d at 1154 (emphasis added). Thus, the Tenth Circuit has made clear that the participation of outside counsel in a criminal proceeding does not violate a defendant's due process rights unless such counsel controlled prosecutorial decisions. *Erikson*, 263 F.3d at 1154. Certainly a criminal defendant is not entitled to less due process protection than a defendant in a civil proceeding.

The Tenth Circuit's decision in *Erikson* is also significant because the *Erikson* Court expressly opined on, and distinguished, *Young v. United States*, 481 U.S. 787 (1987), a case on which Defendants rely, Defendants' Motion, p. 8, as part of their due process argument. *See Erikson*, 263 F.3d at 1154 fn 4. The Tenth Circuit explained that "[i]n *Young*, [481 U.S. 787], the Supreme Court held that an attorney for a party in a position to gain from a criminal contempt proceeding cannot be appointed by the district court to prosecute the party charged with contempt. The Court determined that, because of the inherent conflict of interest and potential for misconduct, the use of an interested private attorney to prosecute a contempt citation is fundamental error." *Erikson*, 263 F.3d at 1154 fn 4. The *Erikson* Court went on to distinguish *Young*:

> Young is distinguishable because, unlike the situation here, the private attorney was the government's sole representative in the contempt trial . . . and he had complete authority over all aspects of the prosecution . . . . Young is also distinguishable on the grounds that the Supreme Court decided the case under its supervisory power over the federal courts, and not as a matter of federal constitutional law.

Erikson, 263 F.3d at 1154 fn 4 (emphasis added).

Applying the principles set forth by the Tenth Circuit in *Erikson*, it is clear that the participation of outside counsel in a state-sanctioned lawsuit does not violate due process where the government representative / counsel participates in the litigation and retains control over critical decision-making. *Erikson*, 263 F.3d at 1154. That is the precise scenario here.

First, the Attorney General's Office actively participates in this litigation. Specifically,

since the commencement of this lawsuit, Attorney General W.A. Drew Edmondson has been -- and remains -- an attorney of record. *See* DKT #3. Moreover, Assistant Attorneys General Kelly Hunter Burch and John Trevor Hammons have also filed appearances and remain attorneys of record. *See* DKT #100 & #132.

Second, the Contract makes it abundantly clear that the Attorney General retains complete control over this litigation. *See* Ex. 4, ¶ 1 ("The lawyers are willing to prosecute such an action, through investigation, settlement discussions, trial and any necessary appeals, under the direction and control of the Oklahoma Attorney General. The Attorney General shall determine the appropriate defendants and theories of liability, and shall have overall control and direction of the litigation, including but not limited to approval of staffing to be employed by the lawyers and approval of experts to be used in the suit as consultants or witnesses") (emphasis added); ¶ 2 ("The lawyers shall consult with and obtain the prior written approval of the Attorney General or his designee concerning major issues affecting the suit, including but not limited to the petition and dispositive motions, selection of consultants, experts and other professional services, discovery, pre-trial proceedings, trial, and settlement negotiations") (emphasis added). The Affidavit of Deputy Attorney General Thomas Gruber makes clear that control over all aspects of the litigation has in fact been exercised by the Attorney General or his designee. *See* Ex. 1 (Gruber Affidavit, ¶¶ 9-10).

Third, although the constitutionality of a state's contingency-based retention of outside counsel in civil litigation appears to be one of first impression in this Circuit, well-reasoned authority from other jurisdictions dictates that the State's retention of outside counsel on a contingency basis does not violate due process. *See, e.g., Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1231 (Md. 1998) (upholding contingency fee agreement between state and outside

counsel in tobacco litigation); *City of San Francisco v. Philip Morris Inc.*, 957 F. Supp. 1130, 1135-36 (N.D. Cal. 1997) (denying defendants' motion to disqualify contingent fee counsel). These courts reasoned that no conflict of interest occurs, and therefore no due process violation, in civil litigation where the government has the authority to enter into contingency fee arrangements and where the government controls the representation. *Glendening*, 709 A.2d at 1242-43. *See also Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 680-81 (S.D. Fla. 1993) (denying motion to disqualify state's privately-retained attorneys under contingency fee arrangement).[9]

3. The authority on which Defendants rely in support of their due process challenge does not support their argument

Instead of addressing relevant Tenth Circuit law that actually addresses the constitutional principles governing a state's retention of outside counsel, Defendants attempt to create a due process theory that is untenable under the authority cited in their Motion. First, Defendants spend the first half of this argument citing only cases addressing the due process-based

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[9] That the State's retention of outside counsel does not trigger due process concerns is further supported, by way of analogy, by the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3731. The FCA permits *qui tam* plaintiffs and outside counsel to sue on behalf of the federal government and recover damages and penalties for allegedly fraudulent charges to the United States. 31 U.S.C. §§ 3729-3731. The FCA permits a successful *qui tam* plaintiff to receive up to 30 percent of the proceeds or settlement of the action (in addition to reasonable expenses, attorneys' fees and costs), thereby creating a type of contingency arrangement with the federal government. 31 U.S.C. at § 3730(d)(1), (2). Yet, such an arrangement under the FCA has repeatedly withstood due process scrutiny. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir. 1993) ("[T]he public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting . . . . [Q]ui tam litigation does not implicate due process concerns"); *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 771 (E.D. Pa. 2001) ("the right of defendants to due process is not infringed by the relator's financial reward"); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623-24 (W.D. Wis. 1995) ("the *qui tam* provision authorizing pursuit by a relator of civil remedies on behalf of the United States is not in violation of the defendants' right to due process"); *see also United States ex rel. Phillips*, 123 F. Supp. 2d 990, 995 (W.D.N.C. 2000) (financial interest of *qui tam* relator does not violate due process).

disqualification of judges or quasi-judicial officials, who stand in the unique position of determining a defendant's guilt or liability (or overseeing that process in a jury setting).[10] *See* Defendants' Motion, pp. 6-7, citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Schweiker v. McClure*, 456 U.S. 188 (1982); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Welch v. Sirmons*, 451 F.3d 675 (10th Cir. 2006). These cases do not stand for the proposition that the due process principles in the judicial/quasi-judicial context are identical to those implicated in the context of a prosecutor or governmental plaintiff, and indeed they are not. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980) ("The constitutional interests . . . are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties").[11] Nor do these cases in any way suggest that due process considerations prohibit a state from retaining outside counsel on a contingency or some other basis.

Defendants go on to suggest -- almost entirely without citation -- that the "due process disqualification" principles governing the judiciary apply equally to government attorneys. *See* Defendants' Motion, pp. 7-8. Defendants' reliance on the limited authority they do cite is misplaced. First, on pages 7 and 8, Defendants rely on *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212 (1960), *Freeport-McMoRan Oil & Gas v. FERC*, 962 F.2d 45 (D.C. Cir. 1992), and *Young v. United States*, 481 U.S. 787 (1987), none of which was decided on due process grounds. Indeed, neither *Berger* nor *Freeport-McMoRan* makes any mention of due process, and the Court in *Young* expressly stated

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[10] Defendants also cite *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), and *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995), both of which involve the judicial recusal statute and neither of which makes any mention of due process.

[11] Moreover, even if the judicial disqualification cases were otherwise applicable, they are nonetheless distinguishable on the basis that, in such cases, the defendants seeking the recusal of their respective judges on due process grounds did so on the basis of their own due process rights. Defendants make no such claim here.

that it was "rely[ing] on [its] supervisory authority to avoid the necessity of reaching any constitutional issues." *Young*, 481 U.S. at 810 fn 21. These decisions therefore lend no support to Defendants' due process challenge to the State's retention of outside counsel in this civil setting.

Defendants also argue that *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), in which the California Supreme Court granted a motion to disqualify a city's private attorney who was charged with prosecuting public nuisance abatement actions against adult bookstores, is applicable to the present case. Defendants' Motion, p. 10. Even if the decision were otherwise binding on this Court, *Clancy* does not support Defendants' claim that due process mandates the disqualification of the State's outside counsel in the present case. First, *Clancy* was not decided on due process grounds and, in fact, makes no mention of due process. Instead, it was decided as a matter of California common law.

Second, perhaps even more importantly, *Clancy*'s holding is inconsistent with governing Tenth Circuit authority, namely, the *Erikson* decision discussed above, in which the Tenth Circuit held that the participation of outside counsel in a criminal proceeding does not violate a defendant's due process rights unless such counsel controlled prosecutorial decisions. *Erikson*, 263 F.3d at 1154.

Third, the *Clancy* court expressly stated:

> Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case. (See, e.g., *Denio v. City of Huntington Beach* (1943) 22 Cal. 2d 580, 140 P.2d 392 [contingent fee arrangement whereby the city hired a law firm to represent it in all matters relating to the protection of its oil rights].) But just as certainly there is a class of civil actions that demands the representative of the government to be absolutely neutral.

Clancy, 705 P.2d at 748 (emphasis added). Thus, the *Clancy* court did not adopt a blanket

prohibition on the government's use of contingency fee arrangements, but instead preserved a category of cases in which "a government may hire an attorney on a contingent fee to try a civil case." *Clancy*, 705 P.2d at 748 ("The justification for the prohibition against contingent fees in criminal actions extends to certain civil cases") (emphasis added). *Clancy*'s citation to *Denio*, a case involving the retention by the City of Huntington Beach of private attorneys on a contingency basis to pursue royalties from oil produced on city property, reveals that, under California law, the propriety of contingency fee arrangements depends on whether the representation is for a civil or criminal/quasi-criminal proceeding. Thus, *Clancy* lends no support to Defendants in this matter.

Fourth, courts analyzing *Clancy*'s persuasive value have correctly distinguished it on the grounds that: (1) *Clancy* directly implicated criminal violations, *Glendening*, 709 A.2d at 1242-43; (2) notably absent from *Clancy* was a legislative enactment authorizing the government's employment of outside counsel, *Glendening*, 709 A.2d at 1243; and (3) *Clancy* lacked the oversight of an elected state official who had authority to control all aspects of outside counsel's handling of the litigation, *Glendening*, 709 A.2d at 1243. Those distinctions apply equally here because: (1) the State has not asserted any criminal violations; (2) the Oklahoma legislature authorizes the government's employment of private legal services on a contingency fee basis, 74 Okla. Stat. § 20i; and (3) the Contract expressly provides that "[t]he Attorney General shall determine the appropriate defendants and theories of liability, and shall have overall control and direction of the litigation," Ex. 4, ¶ 1.

In sum, the Contract plainly does not violate due process.

D. The Contract does not violate the separation of powers doctrine

Defendants also argue that the payment of a contingency fee to outside counsel under the

Contract violates the separation-of-powers provisions of the Oklahoma Constitution.[12] Defendants' Motion, pp. 16-22. Defendants' argument reflects a complete misunderstanding of the operation of contingency fee contract law.

As explained above, the Attorney General has authority to retain outside counsel on a contingency fee basis. A contingency fee contract is "one that provides that a fee is to be paid to the attorney for his services only in the event he wins, that is, a fee which is made to depend upon the success or failure to enforce a supposed right, and which fee is generally paid out of the recovery for the client." *Musser v. Musser,* 909 P.2d 37, 38 fn 1 (Okla. 1995) (quotations & citation omitted) (emphasis added). Put another way, a contingent fee is not one to be paid from the funds of the client, but from the funds gained by judgment or settlement. *See, e.g., City of Barnsdall v. Curnutt*, 174 P.2d 596, 598 (Okla. 1945) ("In the present case intervenor does not ask a personal judgment against the plaintiff but seeks under the above statute the enforcement of a lien upon the fund remaining in the court clerk's hands from the proceeds of the settlement of the cause of action of plaintiff"). Indeed, by way of analogy, the Oklahoma Supreme Court has recognized that a contingency fee contract of a city does not run afoul of the limitation on municipal debt found in Okla. Const., Art. X, § 26 because the attorneys "were not seeking a judgment to be paid from the Town's general revenue funds but from a fund to be created or increased by their services. Under such circumstances the cited constitutional and statutory provisions limiting the city's debt were not applicable to plaintiffs' alleged enforcement of a contingent fee contract . . . ." *Town of Manford v. Watson*, 394 P.2d 506, 510 (Okla. 1964)

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[12] The fact that Defendants have raised this argument at this stage in the proceedings reveals an understandable lack of confidence in their defenses to the State's lawsuit, since the contingency under Contract is only triggered by a recovery against the Poultry Integrator Defendants. Otherwise, Defendants' separation-of-powers argument, to the extent they even have standing to raise it, is premature.

(emphasis added). Thus, fees paid from a fund "created or increased" by the services of attorneys acting pursuant to a contingent fee contract are not yet part of the general revenues of a government client.

The Contract follows this model. The Contract makes clear that "under no circumstances shall the State or the Attorney General be liable for any costs, expenses or attorney fees of the lawyers incurred in preparing and conducting this litigation." Ex. 4, ¶ 2. Outside counsel are only "entitled to recover such fees, costs and expenses as are incurred in the prosecution of the suit from any monetary recovery in the suit after trial or settlement, from an award by the Court to be imposed upon the defendants, by agreement with the defendants, or some combination of these." Ex. 4, ¶ 3(a). "All expenses, costs and attorney fees, if any, shall come from the proceeds of the litigation, as a portion of the recovery in the suit after trial or settlement, from an award by the Court to be imposed upon the defendants, by agreement with the defendants, or some combination of these." Ex. 4, ¶ 2. Thus, no State money is at stake.

Defendants correctly identify the priority of use of funds recovered under the terms of the Contract: first, reimbursement of costs and expenses; second, outside counsel's 33⅓% contingency fee (but not to exceed 50% of any monetary damages); and third, the balance of any recovery to the State, to be employed according to state and federal law, and any order of the Court. *See* Defendants' Motion, p. 12. Defendants then proceed, contrary to law, to argue that an appropriation is necessary for outside counsel to receive their contingency fee. However, because no State money is spent under the Contract, no appropriation is necessary.

Understanding the Contract, and the general law governing contingent fee arrangements, it becomes clear that the Contract does not violate Okla. Const., Art. V, § 55 because the Contract is the vehicle whereby money will be paid into the State, and not spent by the State

(thereby requiring an appropriation). Okla. Const., Art V., § 55 provides, in part that "[n]o money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law . . . ." (Emphasis added.) The recovery in this case cannot be "paid out of the treasury of this State" until it is first paid into the treasury. That will happen, pursuant to the Contract, after costs and fees are deducted and the State's share of the money is available to the State.

Precisely this analytical approach was employed by the court in *Glendening*, 709 A. 2d 1230. In that case, tobacco companies challenged the ability of the Maryland Attorney General to hire outside counsel to assist in prosecuting that state's case against the tobacco industry. In rebuffing a similar argument based upon a claim the contingent fee contract improperly appropriated public funds to outside counsel, the *Glendening* court stated:

> The gross settlement or judgment recovered from the tobacco litigation does not constitute "collections, fees, incomes, [or] other revenues" that must be deposited into the State Treasury. According to the Contract, recovered funds will not be "collected" by the State until outside counsel receives his contingency fee and is compensated his expenses from the gross recovery. *See* Contract ¶ 3.3. . . . . [after fees and costs are paid from the gross recovery] . . . "all monies recovered to the State, net costs and fees" will be transmitted to the Attorney General, who will collect and deposit the funds on behalf of the State. Once the net recovery is collected and deposited into the State Treasury, it thus becomes State funds subject to legislative appropriation, pursuant to Article III, Section 32, which provides that "[n]o money shall be drawn from the Treasury of the State . . . except in accordance with an appropriation by Law." (emphasis supplied). Thus, the gross recovery from the tobacco litigation is not "State" or "public" money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the funds into the State Treasury.

Glendening, 709 A.2d at 1240-41.

Defendants' reliance upon the opinion of a divided Louisiana Supreme Court in *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997), is misplaced because, unlike Oklahoma's statutory authorization for the Attorney General to hire outside counsel on a contingency fee basis, *see* 74

Okla. Stat. § 20i, the Louisiana Attorney General's authority to hire outside counsel was limited to specific situations not applicable to the case at issue. *Meredith*, 700 So. 2d at 481-82.

The Attorney General has not, as suggested by Defendants, supplemented his budget with funds he might recover for the State. Defendants' Motion, p. 19. The Attorney General's budget, and funds appropriated for it, remain unaffected by the Contract. The Contract merely provides a means whereby the Attorney General has enlisted the aid of additional outside counsel, at no expense to the State, to assist him in discharging his duty to protect the interests of the people and the State of Oklahoma from pollution caused by the Poultry Integrator Defendants.

While appropriation is clearly a legislative function, entering into a contract with outside counsel to assist in the prosecution of claims for the State is not an act of appropriation but rather an executive function, properly within the authority of the Attorney General and aimed at recovering money for the State, not spending it. The Attorney General is the executive officer authorized by law to initiate and control litigation for the State. The Attorney General plainly has the statutory and common law authority to hire outside counsel, and to determine the method of how the fees and expenses for such services by outside counsel are to be paid (including by means of a contingency fee). A contingency fee is not an appropriation. Thus, both the executive and legislative branches of the State's government are acting within their proper authority in this matter and there is no violation of the doctrine of separation of powers.

E. Defendants' Motion is not timely and therefore, assuming *arguendo* that it were otherwise to have merit (which it does not), Defendants have waived any objection to the retention of outside counsel on a contingency fee basis

"A motion to disqualify may be waived if it is not filed promptly." *Healy v. Axelrod Construction Company Defined Benefit Pension Plan & Trust*, 155 F.R.D. 615, 622 (N.D. Ill.

1994); *see also Freeman v. Vicchiarelli*, 827 F. Supp. 300, 302 (D.N.J. 1993) ("the right to move for disqualification may be waived if it is not exercised in a timely manner") (citations omitted); *Continental Holdings, Inc. v. United States Can Co.*, 1996 WL 385346, *1 (N.D. Ill. July 3, 1996) ("Waiver is a valid basis for the denial of a motion to disqualify"); *Gross v. Ses Americom, Inc.*, 307 F. Supp.2d 719, 723 (D. Md. 2004) ("When determining whether a party has waived its right to move to disqualify counsel, the Court must examine whether the party filed its motion in a timely manner"); *cf. Green v. Dorrell*, 969 F.2d 915, 919 (10th Cir. 1992) (requiring motion to disqualify judge to be timely).

"Requiring that a motion be timely filed serves two important functions: first it curbs the potential abuse of disqualification motions as a harassing or delaying tactic, and second, it reduces the detriment to the other party's case." *Healy*, 155 F.R.D. at 622 (citations omitted); *see also Gross*, 307 F. Supp.2d at 723 ("Timely service of a motion to disqualify helps to curb the potential use of the motion as a litigation tactic or to harass the opposing party"). "Delays of over two years -- and even less time -- have been deemed to justify waiver." *Continental Holdings*, 1996 WL 385346, *2. "Where there is 'inordinate and inadequately explained delay, a finding of waiver or implied consent may be appropriate.'" *Continental Holdings*, 1996 WL 385346, *2 (citation omitted).

Here, Defendants did not file their motion to disqualify until nearly 2½ years after it appears that Defendants learned of the Attorney General's retention of outside attorneys on a contingency fee basis to prosecute a civil lawsuit against the poultry industry for pollution of the lands, rivers, streams and waters of the State of Oklahoma. In their papers, Defendants have proffered no explanation for their delay, and as such it should be presumed that Defendants' Motion has been brought merely as a litigation tactic intended to harass and delay. Defendants'

Motion is not timely and therefore, assuming *arguendo* that it were to otherwise have merit (which it does not), Defendants have waived any objection to the retention of outside counsel on a contingency fee basis. Defendants' Motion should therefore be denied.

F. This action was brought by the State ex rel. the Attorney General and therefore there can be no legal basis for dismissal

Even assuming *arguendo* that outside counsel were to be disqualified, there would be absolutely no legal basis to dismiss the case against Defendants. This case has been brought by the State. [DKT #2]. The Complaint was signed by the Attorney General. The Attorney General has entered an appearance. [DKT #3]. The Attorney General has the authority to bring this action. *See* 74 Okla. Stat. § 18; 74 Okla. Stat. § 18b(A)(1)-(3); *State ex rel. Derryberry*, 516 P.2d at 818. Given that there can be no disputing that the Attorney General has the authority to bring this action on behalf of the State, there is no legal basis for dismissal under Fed. R. Civ. P. 12(c) (although given the limited resources of the Office of the Attorney General, the practical effect of disqualifying outside counsel would be to leave the State without the necessary resources to effectively right the wrongs caused by the Poultry Integrator Defendants).

IV. Conclusion

WHEREFORE, premises considered, Defendants' Motion [DKT # 1064] should be denied.

Respectfully Submitted,

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